APPENDIX

APPENDIX A

ORDER OF DISMISSAL

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

No. 65-2-CIV-EC

INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff,

-vs-

WILLIAM B. MacDONALD, JR., and NEW AMSTERDAM CASUALTY COMPANY,
Defendants.

Filed April 6, 1965, 11:32 A.M.

This matter came on before the Court on the Motion to Dismiss filed by the defendant herein. This action arose upon a contract between the plaintiff and the defendant MacDonald dated December 19, 1963 for the promotion of a "Heavyweight Championship Fight." The defendant New Amsterdam Casualty Company issued a surety bond on January 13, 1964, which bond agreed to pay plaintiff the difference between $625,000.00 and the amount of the "live" gate up to Three Hundred Thousand Dollars ($300,000.00).

The fight was held at Miami Beach, Florida, as contracted for between Charles "Sonny" Liston and Cassius Clay. The defendant MacDonald is alleged to have paid $224,695.83 to the plaintiff, who seeks $400,304.17 from

him and the full amount of the performance bond, $300,000.00 from the defendant New Amsterdam in accordance with the bond. The defendant moved to dismiss on the grounds that the contract in question is in violation of state law and therefore unenforceable.

Florida Statute Section 548.01 (1963) provides that:

> Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

Section 548.03 defines a pugilistic exhibition as —

> By the term "Pugilistic exhibition, encounter or fight, with or without gloves," as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or mu-

nicipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charged or not; *provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations.* (Emphasis supplied)

It is a Florida law that a contract in violation of a State statute is void and unenforceable. Schaal vs. Pace, 135 So.2d 252 (Fla. App. 1961); Local No. 234 vs. Henley & Beckwith Inc., 66 So.2d 818, 821, (Fla. 1953).

In the instant case the contract between the parties called for the promotion of a prize fight. None of the parties to the contract are within the exception provided in Section 548.03 of the Florida Statutes, nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations.

Moreover, the Court is of the opinion that the provision purporting to exempt stated organizations from the operation of the statute is of doubtful constitutionality, even if applicable in the instant case, which it is not. The

exemption provision would extend the privilege of presenting "boxing exhibitions or fights" to certain citizens while denying it to others, without a reasonable basis for classification in violation of the equal protection provision of the Fourteenth Amendment of the Constitution of the United States. See Morey vs. Doud, 354 U.S. 457 (1957).

It is obvious that a "heavyweight championship fight" as called for in the contract is within the statutory definition of prohibited activity. The contract being in violation of state law, it is therefore

ORDERED, ADJUDGED AND DECREED that the Motion to Dismiss should be and the same is hereby granted with prejudice.

DONE AND ORDERED at Miami, Florida, this the 7th day of April, 1965.

EMETT C. CHOATE

UNITED STATES DISTRICT JUDGE

cc: Marion E. Sibley, Esq.
David D. Phillips, Esq.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 22685

INTER-CONTINENTAL PROMOTIONS, INC.,
Appellant,

vs.

WILLIAM B. MacDONALD JR., and
NEW AMSTERDAM CASUALTY COMPANY,
Appellees.

Appeal from the United States District Court for the Southern District of Florida.

(October 10, 1966.)

Before WISDOM and COLEMAN, Circuit Judges, and HUGHES, District Judge.

WISDOM, Circuit Judge: Before a small crowd in Miami Beach, Florida, February 25, 1964, Cassius Clay (Muhammad Ali) knocked out "Sonny" Liston in the seventh round of a lackluster prize fight for the heavyweight championship of the world. Inter-Continental Pro-

motions, Inc. owned both fighters. William B. MacDonald, the on-the- scene promoter, had agreed to pay Inter-Continental $625,000 for the live gate rights. Unfortunately for MacDonald, the gate receipts amounted to only $225,000. He turned over this amount to Inter-Continental. Inter-Continental sued for the balance. MacDonald and his surety now say that it was illegal to promote a prize fight in Florida, and that the contract was illegal on its face. The district court, agreeing with the defendants, dismissed the complaint. We disagree.

* * *

The contract between the parties called for MacDonald "to stage and handle the live aspect of [the] promotion".

The two opening paragraphs of the contract provide:

> 1. Inter-Continental hereby agrees to produce Charles "Sonny" Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, at an hour to be named, at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the World.
>
> 2. MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seating; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary

> fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate.

MacDonald agreed to post a bond of $300,000 insuring his performance. New Amsterdam Casualty provided this bond.

The contract required MacDonald to pay the sum of $625,000 "upon the completion of tre boxing contest". *At the time MacDonald made his payment of $225,000 apparently he assumed that the contract was lawful.* (Emphasis supplied)

Inter-Continental notified New Amsterdam of MacDonald's default. New Amsterdam refused to pay the $300,000 allegedly due under the performance bond. Inter-Continental then brought this diversity action for breach of contract against MacDonald and New Amsterdam.

The defendants moved to dismiss the original complaint on the ground that Florida law makes it a felony "to voluntarily engage in" or "to render aid" in "any pugilistic exhibition, fight or encounter . . . for which an admission fee is charged"[1] except ". . . boxing exhibitions held by and under the auspices of the American Legion, disabled American veterans, veterans of foreign wars of the United States, . . ." or one of several other specifically approved organizations.[2]

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[1]FSA—§§ 548.01, 548.02.

[2]FSA—§ 548.03.

Inter-Continental moved to amend its complaint. The amendment alleges facts bringing the contract within the exception permitting "boxing exhibitions" to be held under the auspices of certain organizations:[3]

> "Said contract concerned the holding and conducting of a pugilistic contest whicvh was to be held on February 25, 1964 between Charles 'Sonny' Liston and Cassius M. Clay, Jr. Said contest was held by and under the auspices of the Veterans of Foreign Wars of the United States and was licensed and/or permitted by the City of Miami Beach, Florida, as a pugilistic exhibition held under the auspices of the Veterans of Foreign Wars of the United States. In this connection, plaintiff specially pleads Florida Statutes Annotated Section 548.03 as being the statutory basis for (a) the legal holding and conducting of said pugilistic encounter, and (b) the legality of said contract."

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[3] 3543.03 "Pugilistic exhibition defined . . . Provided that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans, or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any milege which is a member of any recognized amateur athletic association and the Circulo Cubana club, a charitable organization now in existence, whether an admission fee is charge or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate *boxing* and wrestling exhibitions held under the auspices of the above named organizations." This provision is not found in the original act, *Laws of Florida*, 1895, *Chapter* 4402, *section* 3, nor in *Gen.St* 1906, *section* 3255; or *Rev.Gen.St.* 1920, *section* 5086. It was added in *Laws of Florida*, 1927, c. 12213, *section 1*; *Comp.Gen.St.* 1927, *section* 7188; *Laws* 1931, c. 14831, *section* 1935, c. 17179, *section* 1, and this was the law in this state thereafter until 1951.

The district court did not rule on this motion for leave to amend nor refer to it in the order dismissing the complaint.

The court gave two reasons for its order. First, the "contract between the parties called for the promotion of a prize fight", not a "boxing exhibition" within the meaning of the exception provided in Section 548.03. Second, even if it was a "boxing exhibition, none of the parties to the contract are within the exception provided in Section 548.03" because none is a member of any of the exempted organizations listed in that section of the law. "Nor does the contract provide that the fight shall be held under the auspices of one of the exempted organizations."

I.

There is no doubt that a contract to perform an illegal act is void and will not be enforced in Florida courts. *Local No. 234 v. Henley & Beckwith Inc.*, 1953, S.Ct. Fla. 66 So.2d 818; *Lassiter & Co. v. Taylor*, 1930, 99 Fla. 819, 128 So. 14. But a close look at the statute's language and legislative history compels the conclusion that the Florida legislature regards a prize fight as a "pugilistic exhibition"; a prize fight with gloves as a permissible "boxing exhibition", if it meets certain requirements.

A. Section 548 was enacted in 1895. Section 548.01 is entitled, "Prize fighting, pugilistic exhibition; penalty." It reads:

> Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or

> between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, or to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years.

The statutory definition, originally enacted without provisos, is contained in Section 548.03:

> By the term "*Pugilistic exhibition, encounter or fight*, with or without gloves as used in this chapter, *is meant any voluntary fight or personal encounter, by blows*, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly. (Emphasis added.)

The defendants construe the definition as referring to three different kinds of pugilism: (1) exhibition, (2) encounter, *and* (3) fight. Or at least two: (1) exhibition and (2) encounter or fight. They rely on Webster's New International Dictionary (2d Ed.) to show that "fight" means "a violent physical struggle for victory" and "encounter" means "a meeting with hostile purpose". They make no reference to Webster's definition of "exhibition" as "any public show; a display as of feats of skill". By exclusion, the defendants reach the result that a "pugilis-

tic exhibition" is not a "fight" or an "encounter" and therefore does not apply to prize fights. Since the contract refers to the contestants as "fighters" and to the match as a "fight for the heavyweight championship", the defendants contend the subject of the contract was a "fight or encounter", not an "exhibition". The defendants assert in their brief that "the definition of the conduct condemned by the statute is for the purpose of differentiating between the condemned conduct and certain conduct not condemned, as set forth in the proviso clause of said section as follows: 'provided that nothing contained herein . . . shall be construed as applying to *boxing exhibitions* held by and under the auspices of the American Legion' " and certain other organizations. This is a patent error, for the legislature defined the condemned conduct in 1895, thirty-two years before the proviso was added to the statute. The 1927 amendment does carve out an exception for certain approved boxing exhibition,[4] but the word "exhibition" as used in this proviso must take the meaning originally given it when Section 548.03 was enacted.

As we read the law, and as the legislature characterized the offense in the title to Section 548.01, the condemned activity is prize fighting or, more accurately, "pugilistic exhibitions". The term "prize fighting" has no technical or common law meaning. *Sullivan v. State*, 1890, 67 Miss. 346, 7 So. 275. A "prize fighter", today as in 1756 when Dr. Samuel Johnson defined the words, is "one that fights publicly for a reward". The legislation prohibits one thing—public displays of pugilism for reward; not two things, (1) sparring exhibitions and (2) fights of encounters. The title to Section 548.03, therefore, is "Pugilistic exhibition defined".

[4]See footnote 3.

A simple test exposes the fallacy in the defendants' theory. If, as they argue, a "pugilistic exhibition" is something different from a "fight" or an "encounter", one should be able to arrive at the definition of pugilistic exhibition by dropping the words "encounter or fight" and that portion of the section relating only to these words. No portion of the section relates exclusively to "encounter or fight". We find, therefore, that

> "By the term pugilistic *exhibition* . . . is meant any voluntary *fight* or personal *encounter* by *blows* . . . at which an admission fee is charged." (Emphasis added.)

Pugilistic exhibitions are therefore public fights for money — in short, prize fights. The laws of some states use the term "prize fighting' 'or its equivalent without qualifying it. In such cases it "includes all fights of that character . . . whether witnessed by many or by few people". *Seville v. State*, 1892, S.Ct. Ohio, 30 N.E. 621, 622. Florida restricts application of the law to pugilistic *exhibitions*, that is, a "public show" or "display" of pugilism, as against private fights.

The syntax and punctuation of Section 548.03 support this construction. The statute uses the singular: one term, "pugilistic exhibition" is defined, not three terms. The phrase "*encounter or fight*" modifies and describes "pugilistic exhibition". It is set off by commas and in the disjunctive sense "*or*" is used to show that pugilistically "fight" and "encounter" are equivalents, and both are other names for "pugilistic exhibition". Of course, sports writers have always used these terms as equivalents and

use them now in faultless sportese to describe "pugilistic exhibitions" or prize fights. For the defendants' construction to be correct, the legislature should have used "*terms*" not "term"; preferred "*and*" to "or", preceded by a comma, if encounter and fight are different; and separated the definitions. If the defendants were right, Section 548.03 should start:

> The terms "pugilistic exhibition, encounter, *and* fight" mean, respectively . . :

In paragraph one of Section 548.02 the legislature does use a comma before "fight", so that all three, "exhibition, encounter, or fight" refer to one thing. In paragraph two of that section these terms are telescoped to "encounter or contest" and, finally, reduced to one word, "contest".[5]

If the defendants' construction were accepted, Section 548.03 would be meaningless. The statute would have no definitions, for "encounter" and "fight" would then be described in their own terms as a "fight or personal encounter by blows". And "pugilistic exhibition" would not be defined at all. On the other hand, the statute does make sense if it is read as stating that a "pugilistic exhibition" means "a voluntary fight or personal encounter by blows.. . . for which an admission fee is charged".

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[5]548.02 Second, Stakeholder, etc.; penalty

Any person who shall act as second, stakeholder, counselor or advisor, or who shall tender aid of any such character, for or to the principal or either of them in such exhibition, encounter, or fight shall be deemed a principal in the offense, and shall be punished as prescribed in § 548.01.

The sheriff or his deputies in any county where there is cause to believe that such an encounter or contest is about to occur, shall enter any house or enclosure, or any other place, and arrest, without warrant, any party engaged or about to engage in such contest.

To accept the notion that a pugilistic exhibition is a mere demonstration of shadow boxing or sparring, one would have to assume that the Florida legislature put such an offense on the same level as bare knuckle fighting. Both offenses would be subject to a fine of not less than $2500 or more than $5000 or imprisonment for not more than five years.

B. The language of this 1895 law must be considered within the context of the times. In 1895 bare knuckle fighting was illegal in almost every state of the union. The Florida statute prohibits prize fighting with or without gloves, but the vice at which the legislation primarily was aimed was public pugilism as then distinguished from boxing.[6] From the time of the 23d Olympiad (688 B.C.) until relatively recently, pugilists fought with their bare hands, or with the caestus (a studded metal glove or wooden hand-shield with slots for the fingers), or wrapped leather thongs around their fists, or used unpadded gloves (a weapon).[7] "Pugilism (from Lat. *Pugil,* boxer) . . . (i.e. fighting with the bare fists) was driven out in favor of boxing (i.e. fighting with the glove) by public opinion and by the general adoption in 1866 of the Marquis of Queensberry rules." Encyclopedia Brittanica (1959), Verbo, "pugilism".

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[6]Before padded gloves were used in prize fights, however, "boxing" and "pugilism" were synonymous. See Egan, Boxiana: Sketches of Ancient and Modern Pugilism from the days of the renowned Broughton and Slack to the Championship of Crib (London 1818) and Miles, Pugilistica, The History of British Boxing . . . from Fig and Broughton, 1719-1740, to the last championship battle between Ring and Heenan in December 1863 (Edinburgh 1906). See also the Gentlemen's Magazine (1731-1832).

[7]I Miles, Pugilistica (Edinburgh 1906); Egan, Boxiana (1818); Menke, Encyclopedia of Sports (1944).

Until the final decade of the nineteenth century, a pugilistic "fight or encounter" meant a bare knuckle fight to the finish under London Prize Ring Rules.[8] These rules permitted the fighters to wrestle, throw each other down, jump on one another, and wear three long spikes in each shoe or boot. A round lasted until one fighter fell or was knocked down or thrown to the ground. The contestants fought until one or the other was forced to stop because of exhaustion or bodily injuries. In 1889, only six years before Florida enacted Section 548, John L. Sullivan, the Boston Strong Boy, won the heavyweight championship by knocking out Jake Kilrain in a clandestine match in Richburg, Mississippi, after 75 rounds and two hours and sixteen minutes of bare knuckle fighting under the London rules.[9] That was the last *pugilistic* fight or encounter for the heavyweight title in the United States. As late as in 1929, the Encyclopedia Brittanica stated, "Boxing [is] the art of attack and defense with the fists protected by padded gloves, as distinguished from pugilism, in which the bare fists or some kind of light gloves affording little moderation of the blow are employed".[10] The first heavyweight title fight with gloves (5-ounce) and under the Marquis of Queensberry rules was not fought until 1892. In that year, in a bout held at the Olympic Club in New

[8]The London rules, as drawn by Jack Broughton, and the Queensberry Rules, drawn by John Graham Chambers, are quoted in Heinz, Fireside Book of Boxing (1961) 51, 75; Menke, Encyclopedia of Sports (1944) 171, 172; Fleischer and Andre, A Pictorial History of Boxing (1959) 12. There is an excellent description of bare knuckle fighting in State v. Olympic Club, 1894, 46 La. Ann. 935, 15 So. 190. See also Egan, supra, Miles, supra, Fleischer, Heavyweight Championship (1949).

[9]See Sullivan, The Life and Reminiscens of a 19th Century Gladiator; Fleischer and Andre, supra; Fleischer, supra.

[10]Encyclopedia Brittanica, Verbo "Boxing".

Orleans, Gentleman Jim Corbett knocked out John L. Sullivan in the 21st round.[11] At the time, Louisiana law (Act 25 of 1890) made prize fighting a crime, but excepted "exhibitions and glove-contests . . . within the rooms of regularly chartered athletic clubs".[12] A "pugilistic [boxing] exhibition" or "glove contest" under Marquis of Queensberry rules was what today is known as a prize fight. "Exhibition" was not used euphemistically. Corbett was one of the most skillful boxers in all prize fight history. The Sullivan-Corbett boxing contest, compared with the Sullivan-Kilrain bare knuckle fight, was an "exhibition" of the manly art of self defense. And in that sense, the Clay-Liston *entente cordiale* was also a boxing exhibition.

In 1894, the State of Louisiana sued to revoke the New Orleans Olympic Club's license on the ground that the Club held, ultra vires, "exhibitions of what is commonly called prize fighting". *State v. Olympic Club*, 1894, 46 La. Ann.

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[11]Corbett has vividly described his fight with Sullivan. Heinz, Fireside Book of Boxing (1961) 85.

[12]"Act No. 25, 1890. Defining the crime of prize fighting, and to provide for the punishment thereof in and out of the state of Louisiana. Section 1. Be it enacted by the general assembly of the state of Louisiana, that any person who shall send, or cause to be sent, publish or otherwise make known a challenge to fight what is commonly called a prize fight, or who shall engage in such fight, or act as trainer for any such, contemplating a participation in such fight ,and any such person who shall act as aider or abettor, backer, umpire, second, surgeon or assistant at such fight, or in preparation for such fight, shall upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months and be fined not more than five hundred dollars." (Section two is omitted, as unimportant.) But to this section is appended the following proviso, to wit: "Provided this act shall not apply to exhibitions and glove-contests, between human beings, which may take place within the rooms of regularly chartered athletic clubs." 15 So. 190 at 192.

935, 15 So. 190. Reporters, lawyers, doctors, and others testified at the trial that the Sullivan-Corbett fight and similar fights were "mere exhibitions of skill in sparring with gloves, not calculated to do *great bodily* injury"; on the other hand, the Sullivan-Kilrain bare knuckle fight to the finish was a prize fight. The Louisiana Supreme Court upheld the jury's verdict that the Club's boxing matches were "exhibitions or gloved contests". "That a nose was occasionally made to bleed . . . or a fact somewhat bruised and disfigured, does not alter the case." 15 So. at 198. The case was remanded on rehearing on the ground that the expert testimony was inadmissible. On the second appeal, the Court held: "Fighting in the arena of the Club, as described in the record, is prize fighting. It is preceded by the training, the challenge, the attendance of seconds, or umpires, *and of surgeons* . . . all the attendant circumstances of a contest with naked hands." 47 La. Ann. 1095, 17 So. 599, 600.

In *Seville v. State*, 1892, S.Ct. Ohio, 30 N.E. 621, the defendant was indicted under a law making prize fighting a crime. He had engaged in a bout licensed by the local mayor as a "glove contest". The contest was allegedly held under Marquis of Queensberry rules, but two-ounce gloves were used and the fight was to the finish. The finish came in the 17th round when one of the contestants was battered until he was unconscious. He never recovered consciousness. The Court held that the "question for the jury to decide, was whether this combat was a prize fight, not what the Queensberry rules or any other rules called it, nor what name those accustomed to such combats have given it."

In the second *Olympic Club* decision and the *Seville* decision the Courts did not decide that the fights in question were outside the scope of "boxing exhibitions" or "glove contests"; they held that such contests were prize fights. Some courts, however, have held that the "word 'fight' implies a purpose to use violence for the purpose of inflicting injury", and it is for the jury "to determine whether the defendants in fact engaged in a fight, or merely in an innocent contest". *State v. Purtell*, 1896, 56 Kans. 479, 43 Pac. 782. The "innocent contest" in that case was described as a "lawful exhibition" and a "sparring contest", but it was fought under Queensberry rules, was scheduled for 25 rounds with the referee free to continue the fight for additional rounds, and it ended with a knock-out in the 22nd round. In *Purtell* as in the first *Olympic Club* case the Court was willing to describe the contests as "exhibitions". But there is no doubt that all of these so-called exhibitions were prize fights. In the trade and in the common parlance of 1895 a pugilistic exhibition or boxing exhibition included a personal encounter by blows under rules substantially similar to those that governed the Clay-Liston boxing contest.

By 1927 the only pugilistic exhibitions that existed were boxing matches, that is, fights or encounters between contestants wearing boxing gloves and fighting under Marquis of Queensberry rules. When the match was for money or when admission was charged, the exhibition was a prize fight. The 1927 amendment legalizes these boxing exhibitions, including prize fights, when they are held by and under the auspices of certain organizations.[13]

C. Related provisions of the Florida statute clearly show that prize fights are within the 1927 exception.

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[13]See footnote 3.

At the same time the exception was enacted the legislature adopted another proviso to Section 548.03. The proviso prohibited

> "prize fights . . . for a National or International Title".

In other words, prize fights for a state or local title and, indeed, all prize fights except those for a national or international title were legalized when held by the exempted organizations.

In 1951 the Florida legislature repealed the proviso relating to title bouts. In its place, the legislature substituted the following language:

> "Provided, further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate *boxing* and wrestling *exhibitions* held under the auspices of the above named organizations. (Emphasis added.)

The undeniable effect of the repeal of the 1927 proviso was to legalize all prize fights, even title bouts—provided, of course, that the fight was held under proper auspices. This broad scale legitimation of prize fighting created the problem whether municipalities might continue to regulate, that is, prohibit or license fights. The object of the 1951 substitute was to reassure the municipalities that the state's legalizing prize fights was not intended to curtail the police power of local authorities. Thus, both the repeal of the 1927 proviso and the enactment of the 1951 proviso show legislative recognition of the legality of prize fighting sponsored by certain organizations.

Consistent with this view, the Florida legislature in 1957 enacted Section 548.04 requiring that a physician examine a "boxer's" physical condition before the boxer enters the ring. The section reads:

> "At any *boxing, sparring or wrestling match or exhibition permitted under § 548.03* there shall be in attendance a duly licensed physician, whose duty it shall be to observe the physical condition of the boxers or wrestlers and advise the referee or judges with regard thereto; any competent physician who has not had less than three years experience as a practitioner may be licensed. No *boxer or wrestler shall be permitted to enter the ring unless, not more than three hours before, a physician shall certify in writing that the boxer or wrestler is physically fit to engage in the proposed contest.* The physician's fee shall be paid by the licensee conducting the *match or exhibition.*" (Emphasis added.)

Section 548.04 does not limit itself to "exhibitions", but mentions "*match* or *exhibition*" in two places, refers to a "*contest*" in a third, and unquestionably applies to "a pugilistic exhibition, encounter, or fight." The substance and tone of the section belie the defendants' argument that the statute outlaws a "fight or encounter". Why a physician unless the "boxing . . . match or exhibition" exposes a boxer to the chance of receiving bodily injuries from blows exchanged in what may be an exhibition but is also a [prize] fight or encounter. As the Louisiana Supreme Court said in the second *Olympic Club* opinion, the presence of a physician (surgeon(is one of the indicia of a prize fight.[14]

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[14] 17 So. at 600.

The wording of Section 548.04 assumes that matches such as the Clay-Liston fight come within the "boxing exhibition" exception. Even if the exception were not originally intended to be that broad, it must be so read now; otherwise the two provisions of the statute would be in conflict. Of course, the conflicting provision which is last in time or last in order of arrangement prevails. *State v. City of Boca Raton*, 1965, 172 So.2d 230, 233. The requirement of a physician at boxing matches is both of these and its statutory purpose, if indeed a conflict exists, must control.

D. In the sports world, as everyone who reads the sports page knows, the inelegant fault of elegant variation is the rule. This rule carries over into legislation relating to sports. In Sections 548.01 and 548.03 the Florida legislature used "pugilistic exhibition, fight or encounter" to describe a prize fight. In Section 548.02, aided by a comma, "exhibition, fight, or encounter" became an "encounter or contest" and simply a "contest". In Section 548.04 the legislature uses interchangeably the words "exhibition", "contest", and "match". In spite of the variety of expression, the statute is clear.

The contract here refers to the boxers as "fighters" five times and refers twice to the Clay-Liston contest as a "fight". But nine times the contract calls the encounter a "boxing contest", three times a "contest", two or three times a "match" or "bout". On its face, therefore, the contract itself demonstrates that it is in harmony with the Florida legislature's use of the terms "pugilistic exhibition" and "boxing exhibition" to include "boxing contest".

* * *

Considering the wording of the Florida statute and its legislative history, we hold that a "prize fight" comes within the scope of the generic terms "pugilistic exhibition" and "boxing exhibition".

III.

The district court held that the contract was void because neither of the parties was or belonged to an approved sponsor listed in the statute, nor did the contract provide that the fight shall be held under the auspices of one of the exempted organizations. The district court apparently gave no effect to the amended complaint. The defendants argue that the amended complaint was properly dismissed, citing several circuit court cases in which complaints were dismissed because the allegations were in direct conflict with the contracts sought to be enforced. *Simmons v. Peavy-Welsh Lumber Co.*, 5 Cir. 1940, 113 F.2d 812; *Foshee v. Daoust Construction Co.*, 7 Cir. 1950, 185 F.2d 23; and *Consolidated Jewelers, Inc. v. Standard Financial Corp.*, 6 Cir. 1963, 325 F.2d 31. The principle of these cases does not apply to Inter-Continental's amended complaint, because that complaint in no way conflicts with the contract Inter-Continental seeks to enforce. Sponsorship of the fight by the Veterans of Foreign Wars is reconcilable with the contract even though the contract makes no mention of such sponsorship.

Schaal v. Race, Fla. App., 1961, 135 So.2d 252, urged by the defendants and cited by the district court, is not applicable. In that case, the plaintiff's original complaint alleged that the plaintiff had rendered advertising services for the defendant's political campaign under an oral contract with the defendant. Florida law required that all

remuneration for services rendered to a political campaign be authorized in writing by the campaign treasurer, and that a knowing violation of this provision was a misdemeanor. The plaintiff subsequently sought to amend his complaint by deleting the part referring to the political campaign. The court dismissed the amended complaint with prejudice, terming it a sham. The amended complaint, in effect, was a direct contradiction of the very facts alleged in the original complaint that had made the contract unenforceable. No such contradiction appears in Inter-Continentals amended complaint. The amendment is completely consistent with the facts alleged in the original complaint, and could as easily be an attempt to correct a legal oversight as a disingenuous effort to make the agreement conform to the law.

The statute requires only that the fight "be held by and under the auspices" of one of the approved groups. It does not require that the approved group be a signatory to every contract that relates to the fight. The absence of any mention of the Veterans of Foreign Wars in the contract between Inter-Continental and MacDonald is not inconsistent with the allegation that the Veterans of Foreign Wars ultimately sponsored the match. In a set of analogous cases, the courts have consistently held that if an act were illegal unless specifically approved by some governmental administrative authority, a contract to do that act would still be upheld even though the contract itself made no mention of the governmental approval. See *Lewis v. Davis*, 1947, 145 Texas 468, 199 S.W.2d 146 (registration under the Texas Securities Act);[15] *Nussen-*

[15]The parties entered a contract to form a partnership for engaging in the oil and gas business. Their projected business activities were illegal unless registered under the Texas Securities Act, and no such registration was mentioned in the contract.

baum v. Chambers & Chambers, 1948, 322 Mass. 419, 77 N.E.2d 780 (approval under the Federal Wage Stabilization Act);[16] *Pennsylvania State Shopping Plazas, Inc. v. Olive*, , 202 Va. 862, 120 S.E.2d 372 (performance of construction contract would violate zoning regulations but zoning variance possible to obtain);[17] *City of Richmond v. A. H. Ewing's Sons, Inc.*, 1960, 201 Va. 862, 114 S.E.2d 608 (zoning variance); *McNally v. Moser*, 1956, 210 Md. 127, 122 A.2d 555 (zoning variance); and *Adamsky v. Mendes*, 1950, 326 Mass. 602, 96 N.E.2d 236 (zoning variance). Several of these cases involved situations where the requisite administrative approval had not yet been received, much less mentioned in the contract. The policy even in those cases has been to hold the contract valid unless clearly invalid on its face.

> "Courts do not go out of their way to discover some illegal element in a contract or to impose hardship upon the parties beyond that which is necessary to uphold the policy of the law." *Nussenbaum v. Chambers & Chambers, supra* at .

This is not an executory contract. Inter-Continental has completely performed its part of the bargain. The potential injustice here is far greater than if neither

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[16]The plaintiff sought to enforce an employment contract which had not been approved by the competent federal authority under the Wage Stabilization Act of 1942, and no mention of obtaining such approval had been made in the contract.

[17]"There is authority that the obligor in a contract is excused from its performance when to perform would violate zoning regulations, but the rule is not applicable where, as in the present case, the zoning laws permit a variance in the regulations and some discretion may be exercised by the proper authorities in granting a permit for a proposed use". 120 S.E.2d 372, at 375.

side had performed and one of the parties were seeking to compel the other to do so. Also, the problems of proof here are far less difficult. If the contract were completely executory the question of fact would be one of intention—whether or not the parties at the time of the contract intended to hold the prize fight without the proper sponsorship in violation of the laws of Florida. In the present case the difficult question of intention is not present because the fight has already been held. The only question of fact is the far simpler one of whether the fight actually was held by and under the auspices of one of the approved groups. (Emphasis supplied)

Even without benefit of the amended complaint, the contract is not on its face unlawful. MacDonald's obligation under the contract "to stage and handle the live aspect of the promotion" should be construed to include the burden of making arrangements for a lawful fight. If there is any doubt as to what the parties meant, a trial should be had, not to contradict the contract but to show what the parties meant by their contract. The defendants should not be allowed to escape from a bad bargain simply because the contract at the time it was entered into was capable of both lawful and unlawful performance. In the circumstances of this case, illegality is an affirmative defense to be raised in the answer and proved by the defendants who bear the burden of proof on this issue. The defendants raised the issue prematurely in their motion to dismiss. The plaintiffs are entitled to their day in court. (We do not reach the question whether MacDonald *could* assert invalidity as a defense where he was the party responsible for failing to bring the contest within the statutory exemption.) (Emphasis supplied)

As for the motion to dismiss for failure to state a claim, this Court has said many times that such a motion "should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim". *Richland Co. v. Harper*, 5 Cir. 1962, 302 F.2d 323, 325.

We hold that the district court erred in dismissing the complaint. We direct the court to grant the plaintiff's motion to amend its complaint. We REMAND the case for a trial on the merits consistent with this opinion.

REVERSED.

COLEMAN, Circuit Judge, dissenting:

I must respectfully dissent. I am of the opinion, as the District Judge held, that the contract for the prize fight was illegal on its face. This being a question of Florida law, which more appropriately could have been settled by the courts of that State, I shall refrain from further discussion.

APPENDIX C

No. 65-2-Civ-TC

FINDINGS OF FACT, CONCLUSIONS OF LAW, and FINAL JUDGMENT

THIS CAUSE came on for trial before the Court sitting without a jury, commencing on Tuesday, October 28, 1969, and the Court having duly considered the evidence therein and being fully advised in the premises, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I.

This Court has jurisdiction of the parties and the subject matter of this cause. This case involves an action for damages in excess of $10,000 for the alleged breach of contract. It is a diversity of citizenship action. The plaintiff is a corporation duly organized and existing under the laws of the State of Pennsylvania, with its principal place of business in Chester, Pennsylvania.

William B. MacDonald, Jr., now deceased, was originally named as a party defendant in this cause and he was a resident of Dade County, Florida. Fred R. Baisden, one of the Executors of the Last Will and Testament of William B. MacDonald, Jr., is a resident of Dade County, Florida. The Miami Beach First National Bank is the other Executor of the Last Will and Testament of William B.

MacDonald, Jr., and is a national banking corporation duly organized and existing under the laws of the United States, with its principal place of business in Dade County, Florida. Both Executors have been duly substituted as defendants in the place and stead of William B. MacDonald, Jr. The defendant New Amsterdam Casualty Company is a New York corporation, having its principal place of business in either Baltimore, Maryland, or Hartford, Connecticut, and maintains an office in Dade County, Florida.

II.

On December 19, 1963, the plaintiff and the now deceased William B. MacDonald, Jr., entered into a contract which provided for the holding, conducting and staging of a championship bout between Sonny Liston, the world heavyweight champion, and Cassius Clay, the challenger, which was to be held at the Miami Beach Convention Hall in Miami Beach, Dade County, Florida, on Tuesday, February 25, 1964. The contract granted to MacDonald the right to stage and handle the live-gate aspect of the aforementioned boxing promotion. MacDonald agreed to pay $625,000 to Inter-Continental upon completion of the aforesaid boxing contest or within three days thereafter, namely, on March 1, 1964, in the event the live-gate receipts were less than $625,000.

Paragraph 8 of the contract provides that MacDonald will post a performance bond in the amount of $300,000 as partial security for the aforementioned amount. Such a bond was posted, with the defendant New Amsterdam Casualty Company named as surety.

Other pertinent portions of the contract provide as follows:

Paragraph 3 of the agreement between the parties obligated the plaintiff, Inter-Continental, at no cost to MacDonald, to furnish a guaranty bond in the sum of $100,000 to indemnify and make MacDonald whole against any loss as the result of either Liston or Clay or both being unable to engage in the boxing contest at the time and on the date aforesaid. Paragraph 3 also provides that the sum of $100,000, which was to be guaranteed by the mentioned performance bond, be paid over to MacDonald if either of the fighters "fail to appear and to fight" at the time provided.

Paragraph 11 of the agreement between the parties binds the plaintiff, Inter-Continental, to have Liston and Clay in Miami Beach, Florida, or within thirty miles thereof, using line-of-sight distance, at least three weeks prior to the staging of said boxing contest. It is also provided in that paragraph that both fighters shall co-operate and make themselves reasonably available without cost to MacDonald for promotional purposes.

Paragraph 14 of the agreement between the parties provides that "if for any reason it becomes necessary to postpone said boxing contest," all provisions of the agreement shall be extended for one week for the two specific dates of March 2 or March 3, 1964, and that if the bout could not be staged on those dates, the agreement was terminated and all parties released of all obligations thereunder, with the added proviso that MacDonald would in that event be entitled to the entire proceeds of the $100,000 bond called for in Paragraph 3 of the agreement.

III.

The case is at issue upon Plaintiff's amended complaint and the amendment thereto, Defendants' answer and amendment thereto, as the issues are stated in the pretrial stipulation entered into by counsel.

IV.

The plaintiff has carried its burden of establishing a prima facie case of breach of contract. The evidence introduced by the plaintiff established the existence of a contract, ~~lawful~~ on its face, the performance of all conditions precedent, and the failure of the defendants to satisfy their contractual obligations. Evidence was introduced to show that MacDonald had paid or caused to be paid to the plaintiffs the sum of $224,694.83; that there remained outstanding and unpaid by the defendants to the plaintiff the sum of $400,304.17, with interest from March 1, 1964. Demand was made upon the defendants but they have failed to pay the balance due.

V.

The defendant MacDonald, having invoked the provisions of §548.03, Florida Statutes, in aid of his contract with plaintiff, cannot now assert its unconstitutionality to escape the burdens of the contract.

VI.

In seeking to avoid liability under the contract in issue, the defendants have raised several issues of law and fact.

The defendants have adopted the position that the fight was not conducted in accordance with the provisions of Florida Statute §548.03. The statute, penal in nature, prohibits pugilistic exhibitions except when conducted by and under the auspices of various named organizations, including the Veterans of Foreign Wars. It was the obligation of the defendants under the contract between the parties to comply with the statute and otherwise to stage a lawful fight. While there is testimony which indicates that the fight was held under the auspices of the VFW, but not by the VFW, the defendants are estopped from asserting non-compliance with the statute. The Fifth Circuit Court of Appeals in its earlier decision in this case, stated that MacDonald had the obligation to conduct a lawful fight. The defendants therefore cannot assert as a defense their own failure to lawfully conduct the fight.

In addition, the last provision of §548.03, Florida Statutes, provides:

> "Provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above-named organizations."

The evidence before the Court indicates that the municipality of Miami Beach exercised its police power in regulating this match and it was held under the auspices of the VFW Post No. 3559.

VII.

The defendants have also asserted that MacDonald was released from his contract obligation of paying the sum of $625,000 in consideration of his excusing the plaintiff's breaches of the contract, namely, Paragraphs 3 and 11 thereof, in order that the plaintiff could preserve and protect the valuable collateral contracts that it had outstanding and save the $100,000 that it might have owed MacDonald had the fight been cancelled.

The testimony on this point indicates that MacDonald was seriously considering withdrawing from his obligations under the contract and that he notified certain officers of the plaintiff corporation of his intentions. A meeting of the principals was held and Garland Cherry, the secretary of the plaintiff corporation, reassured MacDonald to the end that the fight be conducted as scheduled. The evidence before the Court establishes that while Cherry did assure MacDonald that MacDonald would not sustain any loss, this assurance related to actions the plaintiff corporation would take in the future in allowing MacDonald's participation in future promotions should there be a loss on the fight. All other testimony by those present at the meeting or immediately outside of the meeting room is vague as to how this assurance was to be accomplished.

The testimony of Alfred Vallone, MacDonald's chauffeur, that MacDonald said upon exiting the meeting room that the parties had reached an agreement that if the gate was a loss that the plaintiff corporation would make up the difference, is entitled to little weight or credibility. It is inherently unlikely that MacDonald would make such a statement to his chauffeur in the presence of the other

participants and that no one else who was there would have overheard the statement as testified to by Vallone.

Viewed in its totality the evidence before the Court indicates that the defendants have failed to carry their burden of establishing an oral modification of the formal written contract.

Since the Court has found that the fighters did appear and that there was no oral modification of the original agreement, it is not necessary to consider the allegation raised by the defendants that the plaintiff was in breach of the contract by failing to provide the $100,000 performance bond required by Paragraph 3 of the contract.

The defendants have not established that Paragraph 11 of the contract was breached.

The check from the City of Miami Beach, in the amount of $98,695.83 to the plaintiff, marked "Settlement in Full," evidences the closeout of the escrow fund held by the city and is not a defense to the discharge of defendants from their obligation under the contract.

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the subject matter and the parties to the cause.

II.

The contract between the parties from its operation did not accomplish an unlawful purpose and therefore is valid and enforceable.

III.

The contract between the parties was not modified and MacDonald was not released from his guaranty obligation.

IV.

The plaintiff has recovered from the defendants the sum of $224,695.83 and is entitled to recover the additional sum of $400,304.17, plus six (6%) per cent interest from March 1, 1964.

FINAL JUDGMENT

Accordingly, it is ORDERED and ADJUDGED that:

I.

The plaintiff, INTER-CONTINENTAL PROMOTIONS, INC., do have and recover of and from the defendants, THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, and NEW AMSTERDAM CASUALTY COMPANY, the sum of $400,304.17, plus $137,101.72 (interest at 6% from March 1, 1964 to November 15, 1969) or a total of $537,406.89.

II.

The plaintiff shall recover from the defendants named above its costs incurred in and about this action, to be taxed later.

DONE and ORDERED at Miami, Florida, this ____ day of November, 1969.

_____

United States District Judge

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29404

INTER-CONTINENTAL PROMOTIONS, INC.,
Plaintiff-Appellee,

versus

THE MIAMI BEACH FIRST NATIONAL BANK and FRED R. BAISDEN, as Executors of the Last Will and Testament of William B. MacDonald, Jr., deceased, Etc.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(April 9, 1971)

Before GEWIN, COLEMAN and AINSWORTH, Circuit Judges.

AINSWORTH, Circuit Judge: This Florida diversity matter is before us a second time. On the first occasion we reversed the District Judge, who granted defendants' motion to dismiss for failure to state a claim,

and remanded the case for trial on the merits. See *Inter-Continental Promotions, Inc. v. MacDonald*, 5 Cir., 1966, 367 F. 2d 293. Accordingly, a trial was held with a full development of the facts and circumstances of the case. This time the District Court (sitting without a jury) rendered judgment in favor of plaintiff.

This breach of contract action by Inter-Continental Promotions, Inc. against William B. MacDonald, Jr.[1] grows out of the world heavyweight championship fight between Charles "Sonny" Liston and Cassius Clay on February 25, 1964. Inter-Continental and MacDonald entered into a contract by which Inter-Continental agreed to produce Liston and Clay at the specified time and place in Miami Beach, Florida, where they would engage in the boxing contest.[2] In consideration of the payment of $625,000, payable upon the completion of the boxing contest, MacDonald was to receive the live gate proceeds. However, all ancillary rights, such as television, radio and movie rights, were retained by Inter-Continental. Under the contract MacDonald had "the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all

[1]The complaint was originally brought against William B. MacDonald, Jr. and his surety, New Amsterdam Casualty Company. Upon the death of MacDonald, appellants, The Miami Beach First National Bank and Fred R. Baisden, as Executors of the Last Will and Testament of William B. MacDonald, Jr., were substituted in the place and stead of MacDonald and New Amsterdam Casualty Company.

[2]William B. MacDonald, Jr. subsequently assigned to Dundee-MacDonald Enterprises, Inc. his rights and duties under the contract.

fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate." Arrangements were duly made and on February 25, 1964, Clay knocked out Liston and won the heavyweight championship of the world. The gate receipts of only $225,000, however, fell far short of MacDonald's expectations and the consideration he had agreed to pay for those rights. He turned over the gate receipts to Inter-Continental which then brought this suit for the balance.

Florida has declared a public policy forbidding the performance of prize fighting and pugilistic exhibitions for reward. This prohibition is contained in Florida Statutes Annotated § 548.01, a statute providing criminal penalties of a fine of not less than $2,500 nor more than $5,000, or imprisonment for not more than 5 years.[3] Section 548.03, however, excepts from the prohibition boxing exhibitions which are "held by and under the auspices of" certain named civic, educational and charitable organizations, including the Veterans of Foreign Wars, and further provides that "nothing contained herein shall be construed

[3]This section reads as follows:

"548.01 Prize fighting, pugilistic exhibitions; penalty.—

"Any person who shall voluntarily engage in any pugilistic exhibition, fight or encounter, with or without gloves, between man and man, or in an exhibition or fight between man and bull, or between man and any other animal, for money or anything of value, or upon the result of which any money or anything of value is to be collected, acquired, bet or wagered, to see which any admission fee is charged, directly or indirectly, shall be punished by a fine of not less than two thousand five hundred, nor more than five thousand dollars, or by imprisonment for not more than five years."

to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibitions held under the auspices of the above named organizations."[4]

We remanded this case for a factual determination of "whether the fight actually was held by and under the auspices of one of the approved groups." 367 F. 2d at 303. The District Court held that it was so held, finding specifically "that the municipality of Miami Beach exercised its police power in regulating his match and it was held under the auspices of the VFW Post No. 3559." We do not agree, as the evidence is overwhelming to the contrary, and the Trial Judge's ruling is clearly erroneous. Fed. R. Civ. P. Rule 52(a).

In order to circumvent the prohibitory statute against the promotion of pugilistic exhibitions, it is apparent that

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[4]This section reads as follows:

"548.03 Pugilistic exhibition defined. —

"By the term 'Pugilistic exhibition, encounter or fight, with or without gloves,' as used in this chapter, is meant any voluntary fight or personal encounter, by blows, between two or more persons, for money, prize of any character, points, distinction or fame, or other thing of value, or upon the results of which any money or thing of value is bet or wagered, or for which an admission fee is charged, directly or indirectly; provided, that nothing contained herein or in any law or municipal regulation shall be construed as applying to boxing exhibitions held by and under the auspices of the American legion, disabled American veterans, veterans of foreign wars of the United States, Spanish-American war veterans or companies or detachments of the Florida national guard, Y.M.C.A., junior chamber of commerce, or any college which is a member of any recognized amateur athletic association and the Circulo Cabana club, a charitable organization now in existence, whether an admission fee is charged or not; provided further, that nothing contained herein shall be construed to prohibit any municipality from exercising its police powers to regulate boxing and wrestling exhibits held under the auspices of the above named organizations."

an arrangement was made to use the name of Veterans of Foreign Wars, Post 3559 of Miami, Florida, as sponsor of the fight. The consideration paid to the VFW for the use of their name was the nominal sum of $500 cash. Two members of VFW Post 3559 testified that approximately twenty of their members were in attendance on the night of the fight. The Secretary of the Miami Beach Boxing Commission testified that he knew that Dundee-MacDonald was the promoter of the fight but that he actually observed members of the VFW present and that their presence was necessary in order to make the boxing contest a legal venture under the laws of Florida. He also identified sample tickets for the fight on which are printed the words "Sponsored by V.F.W. Miami Beach Post No. 3559." The same witness testified that the Dundee-MacDonald Enterprises had applied for and been issued a license by the Boxing Commission to stage the championship fight.

The evidence is quite clear that the VFW had nothing whatsoever to do with holding, staging or conducting the contest and that the parties to the contract were well aware of that fact. Harold Conrad, a writer and fight promoter, who was public relations director for plaintiff, Inter-Continental, and also on-the-scene agent for Inter-Continental prelimi[illegible]ary to the fight actually taking place, acknowledged in ef[illegible]that the $500 paid to the VFW was a mere gratu[illegible]. The record discloses that he was asked, in that part of his deposition offered in evidence by defendants' counsel, as an admission against interest, the following:

"Q. Do you know what, if any, connection that organization had with this fight?

"A. Well, I think there was some kind of a handout that these guys had been having for years in this town. You can't put on a fight unless they are at the door. I don't know what the details are. I have seen them down through the years."

The Chairman of VFW Post 3559 Boxing and Wrestling Committee, Max Lenchner, testified that VFW had nothing to do with staging the fight. He said that he was told by Mr. Dundee, "We are having a fight next week, Max. Be here with the men." And Lenchner said, "That's the way it is." He further said the check for $500 was received by him, which was paid "for the use of its name in sponsorship of the fight." Then he was asked:

"Q. Now, you had nothing whatever to do with putting on this fight, did you?
"A. That's right. I have nothing to do with it whatsoever.

"Q. Neither did the Veterans of Foreign Wars?
"A. That's correct."

Benjamin Peiser, a member of the VFW Post Committee, who attended the fight and remained at the doorway in order to keep out unauthorized people, testified that the $500 check paid to the Post "was given to our organization for attending that fight." He said he had nothing to do with the taking of tickets, however, and that neither he nor the VFW in any way contributed to staging, holding, conducting or putting on the fight.

Frank Lewis, who was an officer and member of the board of directors of all of the MacDonald Corporations and comptroller of MacDonald, testified that VFW Post 3559 had nothing to do with holding, staging or conducting the Liston-Clay fight. He said:

"Q. And in your capacity as treasurer of the corporation you participated in the negotiation of all of the phases of holding this fight as you just described, is that correct?
"A. Yes, definitely.

"Q. What, if anything, did the Veterans of Foreign Wars, Post 3559, have to do with holding, staging or conducting the Liston-Clay fight that was held on February 25, 1964?
"A. Nothing. We used their name and paid them a contribution for that.

"Q. Do you remember how much the contribution was?
"A. Yes, $500. This was arranged for by Chris Dundee and we paid it, Dundee-MacDonald Enterprises, Inc."

Lewis also testified that "everybody was trying to get into the fight free" and so he restricted the number of people from the Veterans of Foreign Wars which had submitted a list of over thirty names to an authorization of twenty only.

Oscar Markovich, who handled the vending concessions at the Liston-Clay fight at Miami Beach, and who has been at many fights at the Convention Hall as refreshment concessionaire, also testified that the VFW Post had nothing to do with staging the fight. He said:

"Q. Were there Veterans of Foreign Wars present at the fight?
"A. Yes, there was.

"Q. Isn't it a fact that they perform no function other than being present, sir?
"A. I have never seen them perform any functions but I have seen them there.

"Q. They are just merely present?
"A. So far as I can see.

"Q. They don't take tickets?
"A. No, sir.

"Q. They don't usher people to seats?
"A. No, sir.

"Q. And they don't have anything to do with any refreshment concessions?
"A. Nothing whatsoever.

"Q. And they have nothing to do with brining [sic] [bringing] the fight to the auditorium or staging it, that you know of?
"A. No, sir."

The record further shows that MacDonald (or Dundee-MacDonald Enterprises, Inc.) performed all the necessary acts requisite to promoting and staging the fight. They leased the convention hall, worked out arrangements with crowd-control and seating engineers, employed firms to take care of publicity and advertising, contracted for the printing of tickets and programs, and actively handled

every facet of promoting and conducting the fight. The conclusion is inescapable that the Lison-Clay fight was not held under the auspices of the VFW. The use of the organization's name was a mere fiction to avoid the prohibitory Florida statute, and representation on the printed tickets of VFW sponsorship was an obvious subterfuge designed to present a nominal compliance with the Florida law.

A second issue before us is the finding by the District Court that inasmuch as MacDonald had the obligation of conducting a lawful fight under the contract, defendants were estopped from asserting noncompliance with the exclusion clause of Florida Statutes Annotated § 548.03.

The law of Florida is to the contrary. The Supreme Court of Florida, in Montsdoca v. Highlands Bank & Trust Co., 1923, 95 So. 666, 668, said: "The doctrines of estoppel and waiver do not in general apply in transactions they are forbidden by statute or that are contrary to public policy." We cited Montsdoca and used the quoted language with approval in Northwestern National Casualty Company v. McNulty, 5 Cir., 1962, 307 F. 2d 432, 442-443. See also State v. City of Hialeah, Fla. App. 1963, 156 So. 2d 675, 676, reiterating the non-applicability of the doctrine of estoppel to transactions either forbidden by statute or contrary to public policy. The rule applies regardless of whether the party asserting the invalidity of the contract is himself a participant in the wrongdoing.[5] In

[5]See also Citizens' Bank & Trust Co. v. Mabry, Fla., 1931, 136 So. 714, 717; Robert G. Lassiter & Co. v. Taylor, Fla., 1930, 128 So. 14, 19; LeJohn Manufacturing Company v. Webb, D. C. Cir., 1955, 222 F. 2d 48, 52; National Transformer Corp. v. France Mfg. Co., 6 Cir., 1954, 215 F. 2d 343, 361; Standard Lumber Co. v. Butler Ice Co., 3 Cir., 1906, 146 F. 359, 362.

Local No. 234, Etc. v. Henley & Beckwith, Inc., Fla., 1953, 66 So. 2d 818, 823, the Supreme Court of Florida said:

> "The cases are legion that a contract against public policy may not be made the basis of any action either in law or in equity . . . .
>
> "Agreements in violation of public policy are void because they have no legal sanction and establish no legitimate bond between the parties. Brumby v. City of Clearwater, supra. Because of this the defendant may assert the invalidity of the contract even though he is a participator in the wrong. This is so for the reason that one who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." (Emphasis supplied.)

It has also been said that illegality of a contract as a defense is allowed not to protect the defendant but as a disability to the plaintiff. National Transformer Corp. v. France Mfg. Co., 6 Cir., 1954, 215 F. 2d 343, 361; Roberts v. Criss, 2 Cir., 1920, 266 F. 296. The evidence shows that the parties, pursuant to their contract, accomplished an unlawful purpose by virtue of an apparent subterfuge. Under the circumstances, the law will leave the parties where it finds them, and no relief shall be granted because of the dominant public interest. See National Transformer Corp. v. France Mfg. Co., supra at 361. Cf. Twin City Pipe Line Co. v. Harding Glass Co., 283 U. S. 353, 357, 51 S. Ct. 476, 477; Steele v. Drummond, 275 U. S. 199, 207, 48 S. Ct. 53, 55 (1927).

REVERSED.

APPENDIX E

AGREEMENT

THIS AGREEMENT, Made and entered into between INTER-CONTINENTAL PROMOTIONS, INC., a Corporation organized and existing under the laws of the State of Pennsylvania, and having a principal office at 407 Market Street, Chester, Delaware County, Pennsylvania, (hereinafter called Inter-Continental"), and WILLIAM B. MacDONALD, JR., of 9553 Harding Avenue, Trevi Building, Miami Beach 54, Florida, (hereinafter called "MacDonald").

WHEREAS, Inter-Continental has an exclusive contract with Charles "Sonny" Liston, Heavyweight Boxing Champion of the World, and Cassius M. Clay, Jr., number one contender, for the staging of a Heavyweight Championship Bout between Liston and Clay between January 20, 1964, and April 15, 1964; and

WHEREAS, Inter-Continental and MacDonald have negotiated and agreed that MacDonald shall stage and handle the live gate aspect of said promotion;

NOW, THEREFORE, in consideration of the mutual promises and other considerations herein contained, it is agreed as follows:

1. Inter-Continental hereby agrees to produce Charles "Sonny" Liston and Cassius M. Clay, Jr., on Tuesday, February 25, 1964, at an hour to be named, at the Miami Beach Convention Hall in Miami Beach, Florida, where they will then and there engage in a boxing contest

with each other, for fifteen rounds or less, for the Heavyweight Boxing Championship of the World.

2. MacDonald shall have the right and obligation to promote said boxing contest in the manner he deems fit; to print and sell admission tickets thereto; to collect the proceeds of ticket sales; to arrange all seatings; to make whatever arrangements he deems necessary for the press; to pay all local, state, and federal taxes on admissions; to arrange and pay for the undercard preliminary fights; to pay all fees and expenses of the controlling boxing commission; to advertise and promote said live gate; to make press releases; and, to do any and all things of that kind and nature reasonably necessary for the enhancement of said live gate.

3. Within ten days of date of this agreement Inter-Continental, at no expense to MacDonald, agrees to furnish a guarantee bond or non-appearance insurance in the principal sum of One Hundred Thousand Dollars ($100,000.00) in such form and with such company as shall be satisfactory to MacDonald, for the purpose of indemnifying and making MacDonald whole against any losses occurring as the result of either Liston or Clay, or both, being unable to engage in the said contest at the date and time aforesaid, or on any mutually agreed postponed date thereafter as hereinafter provided. Said $100,000.00 shall be paid over in its entirety if either of said fighters fail to appear and to fight at the agreed time as herein provided.

4. Inter-Continental agrees to indemnify and save MacDonald harmless from any and all claims, demands, actions and/or suits, by either Clay or Liston, or both, with respect to the fighters' share of the live gate receipts.

5. Inter-Continental agrees to cooperate with MacDonald by blacking out from closed circuit television for an airline distance of 250 miles from Miami Beach in the Florida peninsula so as not to unreasonably compete with the live gate promotion.

6. MacDonald shall be responsible and liable for all expenses in connection with the promotion of said live gate; however, it is specifically agreed that MacDonald shall not be responsible or liable to either Liston or Clay for their compensation for participating in said boxing contest, or for any training camp or other expenses incurred by either Liston or Clay, or both.

7. For and in consideration of Inter-Continental's sale of said live gate rights to MacDonald, MacDonald agrees to pay Inter-Continental the sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00); said sum shall be due and payable upon the completion of the aforesaid boxing contest, but MacDonald shall have twenty-four (24) hours, thereafter, to pay said sum, provided the live gate receipts less taxes exceeds $625,000.00. If the live gate receipts, less taxes, are less than $625,000.00, then all of the such live gate receipts, less taxes, shall be paid over within twenty-four hours and MacDonald shall have a further period of Seventy-two hours in which to pay the balance of said $625,000.00.

8. As security for said payment of Six Hundred Twenty-Six Thousand Dollars ($625,000.00), MacDonald agrees to post a performance bond, satisfactory to Inter-Continental, in the amount of Three Hundred Thousand Dollars ($300,000.00); as further security for said payment

of Six Hundred Twenty-five Thousand Dollars ($625,000.00), MacDonald agrees to deposit, daily, and within twenty-four (24) hours of receipt, seventy-five percent (75%) of all sums after taxes received from the advance sale of tickets to said boxing contest, said deposits to be made in an escrow account in a bank in Dade County in the name of himself, Inter-Continental, and only if necessary, the City of Miami Beach; in no event shall MacDonald be required to deposit more than a total of Six Hundred Twenty-five Thousand Dollars ($625,000.00) in said escrow account. One-third of the premium on said performance bond, in the amount of Three Hundred Thousand Dollars ($300,000.00), shall be paid for by MacDonald, and the balance of said premium (not to exceed Twenty-five Hundred Dollars ($2,500.00) shall be paid for by Inter-Continental.

9. MacDonald agrees to indemnify and save harmless Inter-Continental from any and all liability arising out of the acts of neglect of himself, his agents, servants, employees, or independent contractors, or from any other liability arising out of the staging of said live gate promotion.

10. Inter-Continental, Liston, Clay and the Louisville Sponsoring Group, or any of them, shall have the right to audit the books and records of MacDonald to determine the gross receipts from the sales of admission tickets to said contest; this paragraph shall not be construed to permit such audit once the aforesaid escrow account has reached a total of Six Hundred Twenty-five Thousand Dollars ($625,000.00).

11. Inter-Continental agrees to have Liston and Clay in Miami Beach, Florida, or within thirty (30) miles thereof (using line of sight distance) at least three (3) weeks prior to the staging of said boxing contest, and further agrees that both of said fighters shall make themselves reasonably available without cost to MacDonald for promotional purposes during said period of time, having due consideration to the obligation of said fighters to train in preparation for said contest.

12. Inter-Continental retains all rights for the promotion, sale and exploitation of all ancillary rights to said boxing contest including, but not limited to television, radio, and movie rights from said match, except program rights to the fight at Miami Beach Convention Hall, which are reserved to MacDonald.

13. Inter-Continental, at no expense to MacDonald, agrees to make preparations and arrangements for the installation of platforms, staging, lines, and other equipment necessary for:

(a) Televising said bout to closed circuit television audiences throughout the world;

(b) Broadcasting said bout by radio throughout the world;

(c) Filming of the movies for showing throughout the world.

MacDonald agrees to cooperate, without cost to him, in such preparations. No such installations shall interfere with the seating or viewing of the live gate spectators.

14. If for any reason it becomes necessary to postpone said boxing contest, it is agreed that all promises, covenants, and conditions herein agreed shall be extended to include the dates of March 2 or March 3, 1964; in the event said bout cannot be staged on either of those dates, this agreement shall terminate, and all parties shall be relieved from all further obligations hereunder; provided, however, MacDonald shall be entitled to the proceeds of the aforesaid $100,000.00 appearance bond or insurance referred to in Paragraph Three above.

15. It is agreed that Inter-Continental shall receive the net sum of Six Hundred Twenty-five Thousand Dollars ($625,000.00) from MacDonald and shall have no liability for any expenses incurred in connection with the promotion of said live gate, except for the payment of the fighters and the payment of two-thirds (2/3) of the premium (not to exceed Twenty-five Hundred Dollars ($2,500.00) of the $300,000.00 bond and all cost for the non-appearance bond or insurance referred to above; each fighter shall bear his own training camp expenses.

16. Inter-Continental and/or MacDonald or both, may assign this agreement to another person, partnership, or corporation, as either or both may choose, but in such event, it is specifically agreed that both Inter-Continental and MacDonald shall each remain fully liable to the other for the full performance of all the conditions, covenants, and promises contained in this agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals, this 19th day of December A.D. 1963.

Signed, sealed and delivered
in the presence of:

/s/ Signature Illegible

(As to MacDonald)

/s/ Signature Illegible

(As to Inter-Continental)

/s/ William B. MacDonald, Jr. (SEAL)

William B. MacDonald, Jr.

INTER-CONTINENTAL
PROMOTIONS, INC.

By /s/ Signature Illegible

Attest: _____